

# We Should See You – Brown Act Compliance

**Presented by:**  
**Jeff Hoskinson, Partner**

**January 15, 2020**

**aa|rr**  
Atkinson, Andelson  
Loya, Ruud & Romo  
A Professional Law Corporation



**PROFESSIONAL  
DEVELOPMENT**

## What is the Brown Act?



**PROFESSIONAL  
DEVELOPMENT**

## Intent of the Brown Act Government Code § 54950

“...It is the intent of the law that [Public Agency] actions be taken openly and their deliberations be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them.”

## Purpose

The purpose of the Brown Act is to facilitate public participation in local government and to curb misuse of democratic process by secret legislation by public bodies.

*Boyle v. City of Redondo Beach*  
(1999) 70 Cal.App.4th 1109, 1116.]

## The “Rule” We Should See You...

- **All meetings** of the **legislative body** of a **local agency** shall be **open and public**, and all persons shall be permitted to attend any **meeting** of the legislative body of a local agency, **except as otherwise provided in this chapter**.

Gov. Code, § 54953

- If a given entity fits within any definition of a legislative body, then it is subject to the various requirements of the Brown Act.

## Legislative Bodies & Members

## Legislative Bodies



- Commissions, committees, boards, or other bodies of a local agency, whether permanent or temporary, decision-making or advisory, **created by resolution or some other formal action** of a legislative body.

Gov. Code, § 54952(b)

## “Examples of Legislative Bodies”

- The governing body of a local agency or any other local body created by state or federal statute
- Personnel commissions
- Boards of supervisors
- Auxiliary organizations

## Not Legislative Bodies

- **Advisory** committees composed **solely** of the members of the legislative body which are less than a quorum of the legislative body.  
Gov. Code, § 54952(b)
- E.g., Ad hoc committee comprised solely of less than a quorum of the board created for the purpose of advising the full board on the qualifications of candidates for appointment to a vacant position is not a legislative body.
- Except: **Standing committees** of a legislative body, irrespective of their composition, which have a **continuing subject matter jurisdiction**, or a meeting schedule fixed by resolution or other formal action of a legislative body, **are legislative bodies** for purposes of the Brown Act.

## Members

- “Member of a legislative body” includes: any person elected to serve as a member of a legislative body who has not yet assumed the duties of office.
- Such persons must conform their conduct to the requirements of the Act as if they had already assumed office.



Gov. Code, § 54952.1

- A legislative body may require that each member and/or any person who has been elected to serve, but has not yet assumed office, be given a copy of the Act.
- But when is a candidate declared elected? Based on the rule of liberal construction: when election results are known.

# What is a Meeting?

# What is a Meeting?



- “Meeting” means any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953, to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.  
Gov. Code, § 54952.2(a)
- “Deliberate” includes the collective acquisition and exchange of facts preliminary to an ultimate decision.
- “Action taken” means a collective decision by a majority of the members of the legislative body, a collective commitment or promise by a majority of the members of a legislative body, to make a positive or a negative decision, or an actual vote of the body.

## What is a “Serial Meeting”?



- A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

Gov. Code, § 54952.2(b)(1)

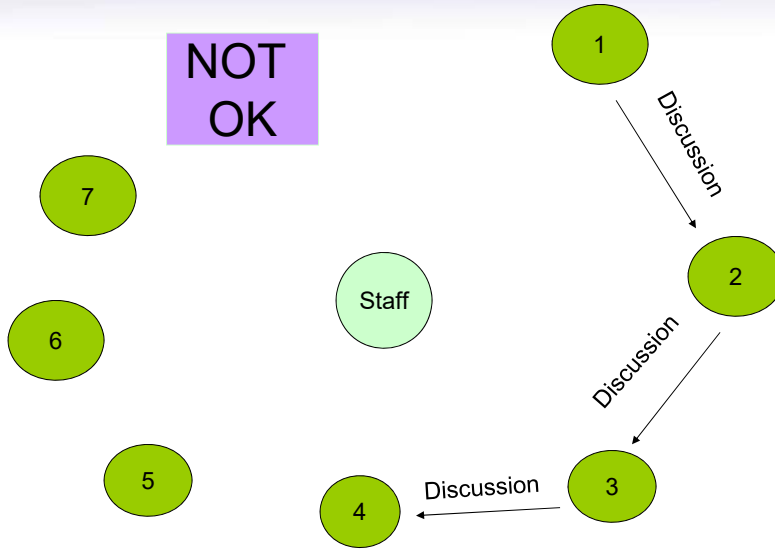
## What is Not a “Serial Meeting”?

- An **employee or official** of a local agency may engage in **separate conversations or communications** outside of a meeting with members of a legislative body in order **to answer questions or provide information** regarding a matter within the jurisdiction of the agency, if that person does **not communicate to members of the legislative body the comments or position of any other member** or members of the legislative body.

Gov. Code, § 54952.2(b)(2)

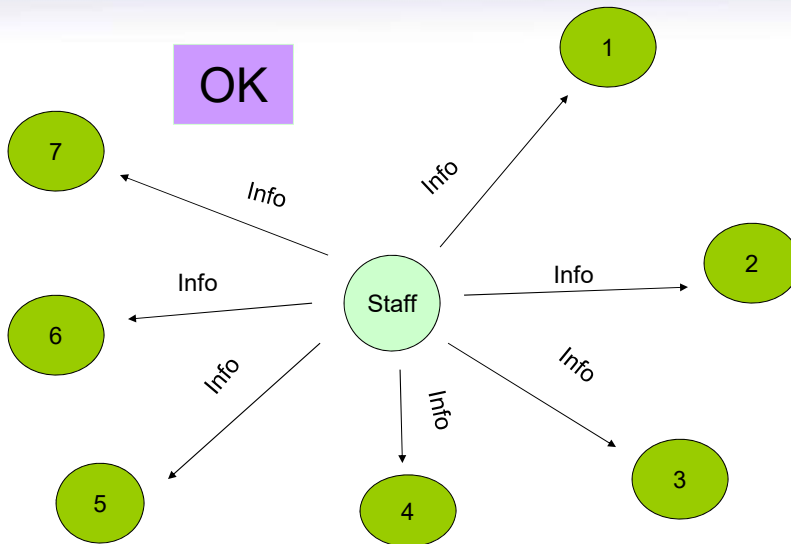
# Prohibited Serial Meeting

NOT OK



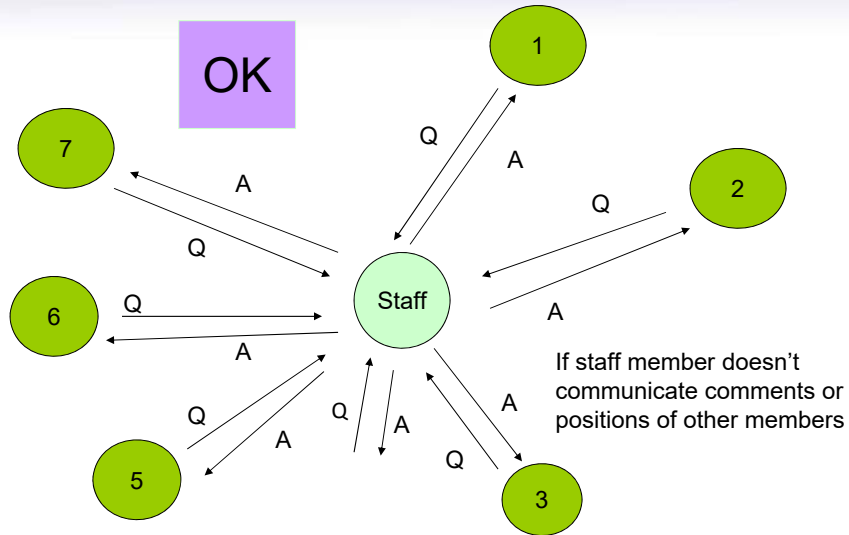
# Permitted Distribution of Information

OK

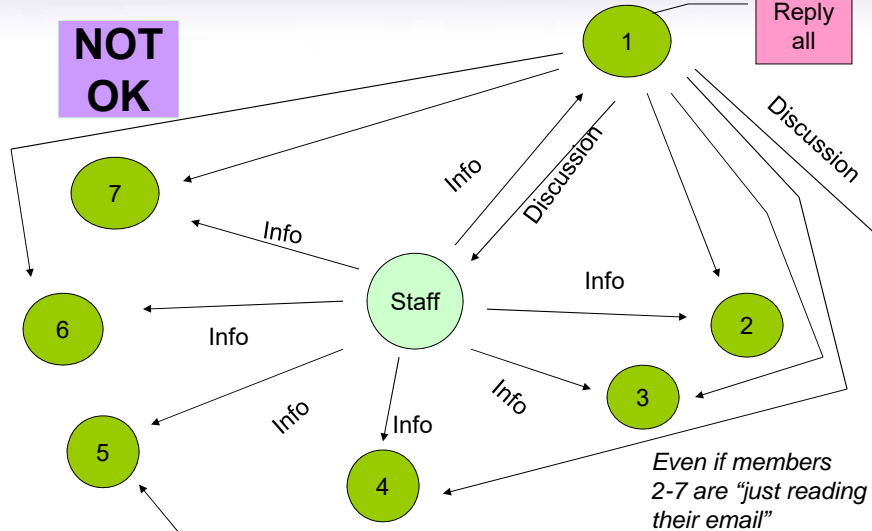




## Permitted Questions & Answers



## Prohibited Meeting by Email



## What is a Not a “Meeting”?

- **Individual contacts or conversations** between a member of a legislative body and any other person.
  - Who is or is not any other person?

Gov. Code, § 54952.2(c)(1)
- **Attendance of a majority** of members at a **conference** or similar gathering **open to the public** discussing **issues of general concern** to the public or agencies, provided members **do not discuss** among themselves, **other than as part of the meeting, business** of a specific nature that is within the jurisdiction of the local agency.

Gov. Code, § 54952.2(c)(2)

## Public Meeting Procedures & Public Participation

## Public Meeting Procedures



- Certain boards must meet at least monthly and must, by rule, fix the time and place for their regular meetings.

Gov. Code, § 54954

## Location of Meetings



- Regular and special meetings must be held ***within the territory of the organization***, except:
  - Court order or to attend a proceeding as a party;
  - Inspect real or personal property;
  - Attend noticed meetings of multi-agency significance within the territory of one of the agencies;
  - Closest meeting facility if the agency has no meeting facility within the organization;
  - Meet with state or federal officials to discuss legislative or regulatory matters affecting the organization.

## Meeting Material – The Agenda

- Any person may request that a copy of the agenda or the documents constituting the agenda packet be mailed to that person.
- If requested, the agenda and documents in the agenda packet shall be made available in appropriate alternative formats to person with a disability as required by the ADA, 42 USC §12132.
- Upon receipt of the written request, the legislative body, or its designee, shall cause the requested materials to be mailed at the time the agenda is posted, or upon distribution to all, or a majority of all, of the member of a legislative body, whichever occurs first.

Gov. Code, § 54954.1

## Meeting Material – The Agenda

- The agenda shall include information regarding how, to whom, and when, a request for disability-related modification or accommodation, including auxiliary aids or services, may be made.

Gov. Code, § 54954.2(a)(1)

- Any request to receive agenda materials is valid for the calendar year in which the request is filed, and must be renewed after January 1 of each year. The legislative body may establish a fee for mailing the agenda or agenda packet.
- The fee shall not exceed the cost of providing the service.
- Agendas must be posted online.

## Meeting Material – Public Records

- Agendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at an open meeting of the body, are dis-closable public records under the California Public Records Act and shall be made available upon request without delay.
- This requirement does not apply to certain records made exempt from public disclosure by the Public Records Act.

Gov. Code, § 54957.5(a)

## Meeting Material – Public Records

- If a public record that relates to an agenda item for an open session of a regular meeting of the legislative body of a local agency is distributed less than 72 hours prior to that meeting, the writing shall be made available for public inspection pursuant to Section 54957.5(b)(2) at the time the writing is distributed to all, or a majority of all, of the members of the body.
- The organization must make any writing described above available for public inspection at a public office or location that the agency designates for this purpose.

Gov. Code, § 54957.5(b)(1)

## Meeting Material – Public Records

- Each local agency shall list the address of this office or location on the agendas for all meetings of the legislative body of that agency.
- The local agency also may post the writing on the local agency's Internet website in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting.
- Documents prepared by the district must be made available for public inspection at the meeting; documents prepared by any other person must be made available after the meeting.

Gov. Code, § 54957.5(c)

## Meeting Material – Public Records

- Nothing in the Act prevents the district from charging a fee or deposit for a copy of a public record as authorized by the Public Records Act.

Gov. Code, §§ 54957.5(d) and 6253

- No additional charge may be imposed on persons with disabilities in order to make these documents available in appropriate alternative formats.

Gov. Code, § 54957.5 (b)(2) and (d)

## Notice of Meetings and Agendas

- The agenda for a regular meeting must be conspicuously posted at least 72 hours prior to the time of the meeting in a location freely accessible to members of the public.

Gov. Code, § 54954.2(a)
- The location where the agenda is posted must be publicly accessible at all times during the required 72-hour period.
- The agenda shall specify the time and location of the regular meeting.
- AB 2257 – Beginning January 1, 2019, the legislative body of a special district, school district, or political subdivision established by the state that has an Internet Web site must provide an online posting of an agenda posted on the primary web site homepage of the entity that is accessible through a prominent, direct link to the current agenda, as specified, and must post in an open format the online posting of an agenda, including but not limited to, an agenda posted in an integrated agenda management platform.

## Notice of Meetings and Agendas

- A regular meeting agenda may **not** be **changed** within the 72 hours preceding the meeting, **unless**:
  - A majority determines that an emergency exists pursuant to Gov. Code, § 54956.5; or
  - Two-thirds of the board members present determine that there is a need for immediate action and the need to take action came to the district's attention after the posting of the agenda; or
  - The item was previously posted for a meeting occurring not more than five days prior and the item was continued to the next meeting.

Gov. Code, § 54954.2(b)
- If no exception applies, the board must either postpone consideration of the item for at least 72 hours, or call and notice a special meeting.

## Notice of Meetings and Agendas

- The agenda must reasonably apprise the public of the matters to be considered in sufficient detail to allow the public to determine whether to participate at the meeting.

*Carlson v. Paradise Unified School District*  
(1971) 18 Cal.App.3d 196

- The Act requires that the agenda contain a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A “brief general description” of an item generally need not exceed 20 words.

## Notice of Meetings – Special Meetings

- Special Meetings – 24 Hour Notice

Gov. Code, § 54956

- May be called by either the president or upon the written request of a majority of board members to the president.
- The board may only consider business specified in the notice.
- The board may hold a closed session as part of a special meeting.
- Public speakers must be heard, but only on items appearing on the agenda.

Gov. Code, § 54954



## Public Participation and Meeting Practices



- Members of the public must be able to address the board regarding items on the agenda ***before or during the governing board's consideration*** of the item.

Gov. Code, § 54954.3

## Public Participation



- Every regular meeting agenda shall provide an opportunity for members of the public to address the board on any ***item of interest*** to the public, ***within the subject matter jurisdiction*** of the board.
- No action shall be taken until the matter is properly noticed on an agenda or an exception to the 72-hour rule is established.
- Every notice of a special meeting shall provide an opportunity for members of the public address the legislative body concerning any item appearing on that agenda.

## Public Participation

- The board may adopt **reasonable rules and regulations** in order to ensure the proper functioning of the meeting.
- Establish clear maximum time limits subject to extension or reduction.
- “The legislative body ... shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body.”

Gov. Code, § 54954.3(c)

## Responses to Public Statements

- The Act limits board members' responses to public comments at any public meeting. Board members and staff may only:
  - Briefly respond to statements made or questions posed by persons making public comments;
  - Ask clarifying questions or make brief announcements;
  - Provide a reference to staff or other resources for factual information; and/or
  - Request staff to report back or place a matter on the agenda for a future meeting.
- Doing otherwise would be the discussion of a non-agendized topic.

Gov. Code, § 54954.2(a)(2)

## Meeting Practices



- No action may be taken by secret ballot.  
Gov. Code, § 54953(c)
- Any person attending a public meeting has the right to record the meeting by still or motion picture camera, or by video or audio tape, absent a finding by the board of persistent disruption of the proceedings.  
Gov. Code, § 54953.5(a)

## Meeting Practices

- A board may not prohibit or restrict the broadcast of its proceedings.  
Gov. Code, § 54953.6
- Any recording made by or at the direction of the board shall be subject to inspection as a public record, but may be destroyed or erased 30 days after recording.
- Inspection of any video or audio recording shall be provided without charge on a machine made available by the district.  
Gov. Code, § 54953.5(b)

## Teleconferencing



- The Act permits “teleconferencing,” for all purposes in connection with any meeting.  
—Gov. Code § 54953(b)
- “Teleconferencing” means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through audio or video, or both.

## Teleconferencing Requirements

- Teleconference meetings must comply with all requirements of the Act.
- All votes taken during a teleconference meeting must be by roll call.
- Agendas must be posted at each teleconference location, identify each teleconference location, and each location must be accessible to the public.
- During the teleconference, at least a quorum of the members of the legislative body must participate from locations within the jurisdiction of the local agency.
- The agenda must provide an opportunity for members of the public to address the legislative body directly from each teleconference location.

In Case of Substantial Disruption of a Board Meeting Rendering Orderly Conduct of the Meeting Unfeasible, the Board Has the Following Options, Except:

- A. Immediately order the room cleared and continue in session.
- B. Adjourn the meeting to a new time and place.
- C. Remove the individuals causing the commotion.
- D. If removing individuals does not restore order, retreat to an inner chamber and continue the meeting, admitting properly credentialed press who were not participating in the disruption.

## Closed Session

## Closed Sessions – Litigation Advice of Counsel

- A board may meet in closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session would prejudice the position of the district in the litigation.

Gov. Code, § 54956.9

- The board must either state on the agenda or publicly announce the authority for the closed session and, when known, the title of the case.
- Litigation is pending when:
  - Proceedings before a court, administrative body, hearing officer, or arbitrator have been initiated;
  - Based on existing facts and circumstances, there is a significant exposure to litigation; or
  - Deciding whether to initiate litigation.

## Closed Sessions – Litigation Advice of Counsel

- Significant exposure to litigation based on “existing facts or circumstances” consists of:
  - Facts and circumstances that might result in litigation which are not known to the potential plaintiff;
  - Facts and circumstances that might result in litigation which are known to the plaintiff and which are publicly stated on the agenda or announced;
  - Receipt of a tort claim or other writing threatening litigation, which shall be available for public inspection;
  - A statement made in a public meeting threatening litigation; or
  - A statement threatening litigation outside of a public meeting for which there is a contemporaneous record that is made available for public inspection.

Gov. Code, § 54956.9

## Settlement of Litigation

- While Section 54956.9 does not expressly so provide, it has been construed to permit a local legislative body to approve settlements in closed session.
- As “emphasized” in the Attorney General’s manual on the Brown Act, “the purpose of [Section 54956.9] is to permit the body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach non-litigation oriented policy decisions.” (Cal. Atty. Gen. Office, The Brown Act (2003), p. 40.)
- However, the litigation exception does not authorize boards to take or agree to take, as part of a non-publicly ratified litigation settlement, action that by substantive law may not be taken without a public hearing and an opportunity for the public to be heard.

## Closed Session Discussions are Confidential

- No person may publicly disclose information that has been received and discussed in closed session concerning pending litigation or any other subject unless the information is authorized by law to be disclosed.

Gov. Code, § 54963

- “We agree with the Attorney General. Disclosure of closed session proceedings by the members of a legislative body necessarily destroys the closed session confidentiality which is inherent in the Brown Act.”

## Examples of “Safe Harbor” Agenda Descriptions

- Conference With Real Property Negotiators
  - Property: (address or parcel number)
  - Agency negotiator: (name of agent)
  - Negotiating parties: (name of other party)
  - Under negotiation: (price, terms, or both)
- Conference With Legal Counsel – Existing Litigation
  - Name of case: (name or case number)
  - Case name unspecified: (indicate whether disclosure would jeopardize service of process or settlement negotiations)

## Prior to Closed Session

- Prior to closed session, the board must disclose ***in open session*** the items to be discussed in closed session.
- The announcement can either repeat all of the information already stated on the agenda, or it may simply refer to the items as they are listed on the agenda by number or letter.

Gov. Code, § 54957.7



## After Closed Session

- After closed session, the board must reconvene in open session (prior to adjournment) and report any action taken in closed session, including the vote or abstention of every member present.

Gov. Code, § 54957.1

- The reports may be made either orally or in writing.

Gov. Code, § 54957.1(b)

- Any documents referred to in a report of final action must be made available on the next business day following the meeting or, in the case of substantial amendments, when any necessary rewriting is complete.

Gov. Code, § 54957.1(c)

## Reports from Closed Session

- Approval given to a settlement of pending litigation shall be reported after the settlement is final
  - If the board accepts a settlement offer signed by the opposing party, the board shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.
  - If final approval rests with the other party or the court, the board shall disclose the fact of approval and the substance of the agreement upon inquiry by any person as soon as the settlement becomes final.

## Reports from Closed Session

- If none of these specified types of “actions” is “taken” during the closed session, there is no duty to report the body’s deliberations or the members’ votes or abstentions with respect thereto.
- When the legislative body of a local agency meets in closed session to consider the proposed dismissal of a public employee, but ultimately rejects that proposal and retains the employee, the legislative body is not thereafter required to publicly report its decision and the vote or abstention of each member.

## Enforcement

## Enforcement – Civil Remedies

- Civil remedies such as injunction, mandamus, or declaratory relief are available for the purpose of stopping or preventing violations of the Act, or to determine the applicability of the Act to ongoing actions of the legislative body. Such actions may be commenced by the district attorney or by any interested person.

### **New as of January 1, 2013**

- These remedies are also available to determine the applicability of the Act to past actions of the legislative body. There are new procedural requirements which must be satisfied in order to seek these remedies.

Gov. Code, § 54960

## Enforcement – Civil Remedies

### **New Procedures**

- Prior to commencing an action to determine the applicability of the Act to a past action, the district attorney or interested party must submit a “cease and desist” letter to the Board.
  - Within nine (9) months of the alleged violation
- The Board has thirty (30) days to respond with an “unconditional commitment” to cease, desist from, and not repeat the past action. There is a format for such a response in the law. The response must be approved in open session, not as a consent item. The response is not considered an admission of wrongdoing. The issuance of the commitment stops any legal action challenging the past action of the legislative body.

## Enforcement – Civil Remedies

- A legal action can be commenced against the District within sixty (60) days of the Board responding that it will not issue an “unconditional commitment” letter or sixty (60) days after expiration of the 30-day time period for the Board to respond.

Gov. Code, § 54960.2

## Enforcement – Civil Remedies

- Violations of the meeting notice and agenda provisions may cause an action to be null and void. Such actions may be commenced by the district attorney or by **any interested person**.

### **Old Procedures Still Valid**

- Prior to commencing an action for violation of the meeting notice and agenda provisions, the interested party, or DA, must demand in writing that the board "cure or correct" the alleged violation.
  - Within 90 days of the action, or 30 days if the action was taken in open session in violation of the agenda requirements.
- Any civil action must be commenced within 15 days of the board's refusal to cure, or expiration of 30 days after the demand, whichever is earlier.

Gov. Code, § 54960.1

## Enforcement

- A successful plaintiff is entitled to recover attorney's fees.
- A court may award court costs and reasonable attorney fees to a local agency defendant in an action only where the defendant has prevailed in a final determination of such action and the court finds that the action was clearly frivolous and totally lacking in merit.

Gov. Code, § 54960.5

## THE BROWN ACT AND BOARD MEMBER SOCIAL MEDIA USE

## Board Member Considerations

- Uses:
  - As an individual vs. as a board member
  - For campaign/election purposes
  - Keeping constituents informed
  - Reposting updates and info from organization's pages
- Cautions:
  - Are you speaking as an individual or as a board member?
  - Do you appear to be representing the organization or whole board?
  - Use of social media to express disagreement with board majority

## Scenario

- Four of your five board members have personal Facebook pages set to private. All five board members are Facebook "friends." One member posts on his FB wall, "*I'll be voting yes on the Resolution to adopt a Project Labor Agreement. We must support living wages in our community.*"
- What if other board members reply to his post?
- What if two other board members hit "like" (or "react")?



## What's Prohibited?

- Irrespective of form or media, the Brown Act prohibits board members from:
  - Exchanging facts to develop collective concurrence
  - Engaging in substantive discussions that:
    - Advance or clarify an issue
    - Facilitate agreement or compromise
    - Advance ultimate resolution
- It is conceivable that three or more board members could post comments or opinions on the organization's (or each other's) Facebook page(s) on issues up for board consideration. Such communications, when taken in aggregate, could constitute a prearranged discussion of the public business of the board by a majority of its members (i.e., a serial meeting.)

## Practical Guidelines

- Refrain from using electronic communication devices—cell phones, camera phones, pagers, beepers, and other small devices **during board meetings**.
  - Board meetings are public
  - Viewed as lack of interest in the proceedings
  - May trigger a Public Records Act request for your device
  - Your extemporaneous comments may be regretted later
  - Closed session confidentiality *must* be preserved

# Question & Answer

## Disclaimer

This AALRR presentation is intended for informational purposes only and should not be relied upon in reaching a conclusion in a particular area of law. Applicability of the legal principles discussed may differ substantially in individual situations. Receipt of this or any other AALRR presentation/publication does not create an attorney-client relationship. The Firm is not responsible for inadvertent errors that may occur in the publishing process.

© 2020 Atkinson, Andelson, Loya, Ruud & Romo



# Thank You

For questions or comments, please contact:

Jeff A. Hoskinson  
(949) 453-4260  
jeff.hoskinson@aalrr.com

**aalrr**  
Atkinson, Andelson  
Loya, Ruud & Romo  
A Professional Law Corporation



**PROFESSIONAL  
DEVELOPMENT**



California Special  
Districts Association  
*Districts Stronger Together*

This webinar is provided for general information only and is not offered or intended as legal advice. Attendees should seek the advice of an attorney when confronted with legal issues and attorneys should perform an independent evaluation of the issues raised in this webinar.



**PROFESSIONAL  
DEVELOPMENT**